U.S. Department of Labor

Office of Administrative Law Judges
36 E. 7th Street, Suite 2525
Cincinnati, Ohio 45202

(513) 684-3252
(513) 684-6108 (FAX)

Issue date: 25Apr2002

Case No: 2001–BLA–0278

In the Matter of

JAMES BLEVINS BARRETT,

Claimant

v.

GREAT WESTERN COAL, INC.,

Employer,

HARTFORD ACCIDENT & IND. COMPANY,

Carrier,

and

DIRECTOR, OFFICE OF WORKERS' COMPENSATION PROGRAMS,

Party-in-Interest.

APPEARANCES:

Ron Carson, Lay Representative
For the claimant

Gregory Little, Esquire
For the employer/carrier

BEFORE: JOSEPH E. KANE
Administrative Law Judge

DECISION AND ORDER — DENYING BENEFITS

This proceeding arises from a claim for benefits under Title IV of the Federal Coal Mine Health and Safety Act of 1969, as amended, 30 U.S.C. § 901 *et seq*. (the Act). Benefits are awarded to coal miners who are totally disabled due to pneumoconiosis. Surviving dependents of coal miners whose deaths were caused by pneumoconiosis may also recover benefits. Pneumoconiosis, commonly known as black lung, is a chronic dust disease of the lungs arising from coal mine employment. 20 C.F.R. § 718.201(a) (2001).

On December 12, 2000, this case was referred to the Office of Administrative Law Judges for a formal hearing. (DX 33). Following proper notice to all parties, a hearing was held on January 28, 2002, in Harlan, Kentucky. The Director's exhibits were admitted into evidence pursuant to 20 C.F.R. § 725.456, and the parties had full opportunity to submit additional evidence and to present closing arguments or post-hearing briefs.

The Findings of Fact and Conclusions of Law that follow are based upon my analysis of the entire record, arguments of the parties, and the applicable regulations, statutes, and case law. They also are based upon my observation of the demeanor of the witnesses who testified at the hearing. Although perhaps not specifically mentioned in this decision, each exhibit and argument of the parties has been carefully reviewed and thoughtfully considered. While the contents of certain medical evidence may appear inconsistent with the conclusions reached herein, the appraisal of such evidence has been conducted in conformance with the quality standards of the regulations.

The Act's implementing regulations are located in Title 20 of the Code of Federal Regulations, and section numbers cited in this decision exclusively pertain to that title. References to DX, CX, and EX refer to the exhibits of the Director, claimant, and employer, respectively. References to JX refer to joint exhibits. The transcript of the hearing is cited as "Tr." and by page number.

ISSUES

The parties stipulate the length of coal mine employment, timeliness, status as a miner, post-1969 employment, responsible operator, and dependency. (Tr. 9-10). The following issues remain for resolution:

1. whether the miner has pneumoconiosis as defined by the Act and regulations;

2. whether the miner's pneumoconiosis arose out of coal mine employment;

3. whether the miner is totally disabled;

4. whether the miner's disability is due to pneumoconiosis; and

5. whether the evidence establishes a material change in conditions within the meaning of Section 725.309(d)?

The employer also contests other issues that are identified at line 18 on the list of issues. (DX 33). These issues are beyond the authority of an administrative law judge and are preserved for appeal.

FINDINGS OF FACT AND CONCLUSIONS OF LAW

Factual Background and Procedural History

The claimant, James B. Barrett, was born on July 13, 1943. (DX 1). Mr. Barrett married Linda Blevins on December 18, 1970, and they reside together. (DX 1). They had no children who were under eighteen or dependent upon them at this time this claim was filed. (DX 1).

Mr. Barrett testified that he currently suffers from back, joint, and respiratory problems. (Tr. 13). The claimant takes a variety of medications for his ailments, including Prevental, Primatine Mist, Seravent, and Flovent. (Tr. 14, 21). He testified that his impairments prevent him from any substantive exertion. He toils in his yard to a limited degree, but he is not employed. (Tr. 15). Claimant testified that his respiratory condition, regardless of any other impairments he suffers from, would prevent him from resuming his previous coal mine employment. (Tr. 15).

The claimant has smoked for twenty years. (Tr. 17). He currently smokes one-half pack of cigarettes per day, although he has smoked more during his history of tobacco use. (Tr. 17).

Mr. Barrett filed his application for black lung benefits on March 3, 2000. (DX 1). The Office of Workers' Compensation Programs awarded the claim on October 16, 2000. (DX 27). Pursuant to employer's request for a formal hearing, the case was transferred to the Office of Administrative Law Judges for a formal hearing. (DX 33).

Coal Mine Employment

The duration of a claimant's coal mine employment is relevant to the applicability of various statutory and regulatory presumptions. At the hearing, the parties stipulated that Mr. Barrett worked for twenty-five years in qualifying coal mine work. (Tr. 8-9). Based upon my review of the record, I accept the stipulation as accurate and credit claimant with twenty-five years of coal mine employment.

The claimant last worked for New Horizon Coal as a roof bolt operator. Claimant's job required him to bend, stoop, lift, and occasionally crawl as he secured bolts to the roof of the mine. (Tr. 12). To accomplish his job, Claimant would sometimes wear a respirator. (Tr. 13). Claimant worked for New Horizon Coal for seventeen years. (Tr. 12).

Medical Evidence

A. X-ray reports[1]

Exhibit	Date of X-ray	Date of Reading	Physician/ Qualifications	Interpretation
EX 3	07/26/95	08/28/95	Powell/B/BCR	Completely negative.
DX 23	10/04/95	05/27/96	Vuscovich/B	Completely negative.
DX 23	10/04/95	07/31/96	Powell/B/BCR	Completely negative.
DX 23	10/04/95	04/17/96	Jarboe/B	Completely negative.
DX 34	10/04/95	02/28/00	Barrett/B/BCR	Completely negative.
DX 23	01/19/96	02/02/96	Dineen	Negative.
DX 6	03/28/00	03/28/00	Baker/B/BCR	1/0 pneumoconiosis, p/p
DX 6	03/28/00	04/10/00	Sargent/B/BCR	Completely negative.
DX 6	03/28/00	04/27/00	Barrett/B/BCR	Completely negative.
DX 25	03/28/00	08/17/00	Jarboe/B	Completely negative.

[1] A chest x-ray may indicate the presence or absence of pneumoconiosis as well as its etiology. It is not utilized to determine whether the miner is totally disabled, unless complicated pneumoconiosis is indicated wherein the miner may be presumed to be totally disabled due to the disease. A "B" reader is a physician who has demonstrated proficiency in assessing and classifying x-ray evidence of pneumoconiosis by successfully completing an examination conducted by or on behalf of the Department of Health and Human Services. *See* 42 C.F.R. § 37.51(b)(2). Interpretations by a physician who is a "B" reader and is certified by the American Board of Radiology may be given greater evidentiary weight than an interpretation by any other reader. *See Woodward v. Director, OWCP*, 991 F.2d 314, 316 n.4 (6th Cir. 1993); *Herald v. Director, OWCP*, BRB No. 94-2354 BLA (Mar. 23, 1995)(unpublished). A "BCR" is a board-certified radiologist.

Exhibit	Date of X-ray	Date of Reading	Physician/ Qualifications	Interpretation
DX 26	03/28/00	09/01/00	Wiot/B	Completely negative.
EX 10	12/20/00	12/20/00	Dahhan	Completely negative.
DX 35	12/20/00	12/28/00	Barrett/B/BCR	Completely negative

B. Pulmonary Function Studies[2]

Exhibit/ Date	Physician	Age/ Height	FEV_1	FVC	MVV	FEV_1/ FVC	Tracings	Comments
DX 6 03/28/00	Baker	56 69.75'	1.78	3.13		0.68	Yes	Patient complained of hands and toes becoming numb and tingling after six attempts. Patient was cooperative, but test was terminated because of high blood pressure. Fair cooperation and good comprehension. Questionable effort.
DX 6 04/28/00	Baker	56 69.75'	2.05	4.10	97	0.50	Yes	Good comprehension and cooperation.
EX 14 12/21/00	Dahhan	57 70'	2.11 2.12*	3.5 3.37*	80 76*	0.77 0.80*	Yes	Fair effort and cooperation.

[2] The pulmonary function study, also referred to as a ventilatory study or spirometry, measures obstruction in the airways of the lungs. The greater the resistance to the flow of air, the more severe any lung impairment. A pulmonary function study does not indicate the existence of pneumoconiosis; rather, it is employed to measure the level of the miner's disability. The regulations require that this study be conducted three times to assess whether the miner exerted optimal effort among trials, but the Board has held that a ventilatory study which is accompanied by only two tracings is in "substantial compliance" with the quality standards at § 718.204(c)(1). *Defore v. Alabama By-Products Corp.*, 12 B.L.R. 1-27 (1988). The values from the FEV1 as well as the MVV or FVC must be in the record, and the highest values from the trials are used to determine the level of the miner's disability.

Exhibit/ Date	Physician	Age/ Height	FEV_1	FVC	MVV	FEV_1/ FVC	Tracings	Comments
CX 15 02/01/01	Craven	57 71'	1.77	3.74	81	0.47	Yes	Good effort and cooperation.

*denotes testing after administration of bronchodilator

Validation Study: Dr. N. K. Burki issued a validation study on April 13, 2000, reviewing the March 28, 2000 pulmonary function study performed by Dr. Baker. (DX 6). Dr. Burki indicated that the test was "not acceptable" due to the "[l]ess than optimal effort, cooperation and comprehension" of the claimant. Dr. Burki's conclusion was based upon the comments of the test observer and the test tracings.

Validation Study: Dr. N. K. Burki issued a validation study on May 12, 2000, reviewing the April 28, 2000 pulmonary function study performed by Dr. Baker. (DX 6). Dr. Burki indicated that the test was "acceptable."

C. Arterial Blood Gas Studies[3]

Exhibit	Date	Physician	pCO_2	pO_2	Resting/ Exercise	Comments
DX 6	03/28/00	Baker	38	73	Rest	Results while exercising medically contradicted due to Claimant's blood pressure of 200/120.
EX 18	12/21/00	Dahhan	41.1	66.3	Rest	Claimant declined exercise study alleging back pain.

D. Narrative Medical Evidence

Dr. Abdul Dahhan examined the claimant on December 20, 2000. (EX 10). The doctor recorded a twenty-five year coal mining history for the claimant, along with a tobacco use history spanning over three decades. Dr. Dahhan noted that Claimant had a history of daily cough with

[3]A blood gas study is designed to measure the ability of the lung to oxygenate blood. The initial indication of a miner's impairment will most likely manifest itself in the clogging of alveoli, as opposed to airway passages, thus rendering the blood gas study a valuable tool in the assessment of disability.

sputum production, hypertension, and occasional chest pain. The claimant complained of frequent wheezing and dyspnea upon exertion, such as climbing a flight of stairs. Dr. Dahhan submitted the claimant to an electrocardiogram, arterial blood gas, pulmonary function test, and a chest x-ray, in addition to his physical examination. The doctor also reviewed various medical records generated by other physicians examining the claimant. Based upon his own examination and review of Claimant's medical records, Dr. Dahhan arrived at the following conclusions: 1) there is insufficient objective data to justify the diagnosis of coal worker's pneumoconiosis; 2) Claimant has chronic obstructive lung disease; 3) while direct measurement of the claimant's ventilatory capacity was impossible due to poor performance on spirometry testing, all other parameters of his respiratory system indicate no evidence of total or permanent pulmonary disability; 4) Claimant's obstructive ventilatory defect did not result from coal dust exposure or coal workers' pneumoconiosis; 5) Claimant has not been exposed to coal dust since 1995, a period sufficient to cause cessation of any bronchitis that he may have had; 6) Claimant's obstructive ventilatory defect has resulted from his lengthy smoking habit; 7) Claimant reported he smoked one-half pack of cigarettes per day, however his carboxyhemoglobin level was consistent with an individual smoking over one pack per day; and 8) Claimant has essential hypertension and low back pain.

Dr. Glen Baker examined the claimant and issued an opinion on March 28, 2000. (DX 6). He recorded a coal mine employment history spanning twenty-five years and a medical history of wheezing, chronic bronchitis, arthritis, allergies, and high blood pressure. During the examination, the claimant complained of daily cough with sputum production, wheezing, dyspnea upon walking 200 yards, chest pain, and orthopnea. The doctor submitted the claimant to a chest x-ray, pulmonary function study, and an arterial blood gas. The doctor concluded that 1) the x-ray showed the presence of pneumoconiosis, 2) the pulmonary function study demonstrated a moderate obstructive defect, and 3) the arterial blood gas evidenced a mild resting arterial hypoxemia. Dr. Baker diagnosed Claimant with the following cardiopulmonary conditions: 1) coal workers' pneumoconiosis based upon a chest x-ray and significant duration of exposure; 2) chronic obstructive pulmonary disease based upon the results of the pulmonary function test; 3) chronic bronchitis based upon Claimant's history of cough, sputum production, and wheezing; 4) hypoxemia based upon the results of the arterial blood gas; and 5) chest pain based upon the claimant's medical history. The doctor indicated that he believed that Claimant suffered from an occupational lung disease which was caused by his coal mine employment. Dr. Baker ranked the claimant's level of impairment as "moderate." The doctor opined that the claimant's pulmonary impairment was caused by both his cigarette smoking and coal dust exposure. He also concluded that the claimant lacked the respiratory capacity to perform his usual coal mine employment or comparable work.

On June 16, 2000, Dr. Baker issued a letter addressing the claimant's medical condition. (DX 6). He states:

> Mr. Barrett was felt by me to have a Category 1/0 Pneumoconiosis. Other board certified radiologists, who are B readers, read the film as negative, which is obviously a priority. He still has moderate obstructive airway disease, and also has a significant smoking history of approximately 20 years, up to 1 pack per day. Pulmonary function studies show moderate obstructive defect. Arterial blood gases revealed mild resting arterial hypoxemia. The symptom complex could all be due to cigarette smoking or could be due to a combination of cigarette smoking and coal dust exposure. Coal dust exposure will cause bronchitis, obstructive airway disease and may cause resting arterial hypoxemia. He has had a significant history of dust [sic] and it is felt it probably contributes to some extent in an undefinable proportion to his pulmonary complaints.

Id.

DISCUSSION AND APPLICABLE LAW

Because Mr. Barrett filed his application for benefits after March 31, 1980, this claim shall be adjudicated under the regulations at 20 C.F.R. Part 718. Under this part of the regulations, claimant must establish by a preponderance of the evidence that he has pneumoconiosis, that his pneumoconiosis arose from coal mine employment, that he is totally disabled, and that his total disability is due to pneumoconiosis. Failure to establish any of these elements precludes entitlement to benefits. *See Anderson v. Valley Camp of Utah, Inc.*, 12 BLR 1-111, 1-112 (1989). The instant claim is Mr. Barrett's second claim for benefits. As noted above, his previous claim, brought in 1992, was denied. (DX 32).

Refiled Claim

In cases where a claimant files more than one claim and a prior claim has been finally denied, later claims must be denied on the grounds of the prior denial unless the evidence demonstrates "a material change in condition." 20 C.F.R. § 725.309(d). The United States circuit courts of appeals have developed divergent standards to determine whether "a material change in conditions" has occurred. Because Claimant last worked as a coal miner in the state of Kentucky, the law as interpreted by the United States Court of Appeals for the Sixth Circuit applies to this claim. *Shupe v. Director, OWCP*, 12 BLR 1-200, 1-202 (1989).

The Sixth Circuit has adopted the Director's position for establishing a material change in conditions. Under this approach, an administrative law judge must consider all of the new evidence, both favorable and unfavorable, to determine whether the miner has proven at least one of

the elements of entitlement that previously was adjudicated against him. If a claimant establishes the existence of one of these elements, he will have demonstrated a material change in condition as a matter of law. Then, the administrative law judge must consider whether all the evidence of record, including evidence submitted with the prior claims, supports a finding of entitlement to benefits. *Sharondale Corp. v. Ross*, 42 F.3d 993, 997-98 (6th Cir. 1994). *See Lisa Lee Mines v. Director, OWCP*, 86 F.3d 1358, 1363 (4th Cir. 1996).

Applying the *Ross* standard, I must review the evidence submitted subsequent to March 12, 1992, the date of the prior final denial, to determine whether claimant has proven at least one of the elements that was decided against him. (DX 32). The following elements were decided against Mr. Barrett in the prior denial: (1) the existence of pneumoconiosis; (2) pneumoconiosis arising from coal mine employment; (3) total disability; and (4) total disability due to pneumoconiosis. If the claimant establishes any of these elements with new evidence, he will have demonstrated a material change in condition. Then, I must review the entire record to determine entitlement to benefits.

Pneumoconiosis and Causation

Under the Act, "'pneumoconiosis' means a chronic dust disease of the lung and its sequelae, including respiratory and pulmonary impairments, arising out of coal mine employment." 30 U.S.C. § 902(b). Section 718.202(a) provides four methods for determining the existence of pneumoconiosis. Each shall be addressed in turn.

Under section 718.202(a)(1), a finding of pneumoconiosis may be based upon x-ray evidence. The record contains thirteen interpretations of five chest x-rays. Of these interpretations, twelve were negative for pneumoconiosis while one was positive.

Because pneumoconiosis is a progressive disease, I may properly accord greater weight to the interpretations of the most recent x-rays, especially where a significant amount of time separates the newer from the older x-rays. I also may assign heightened weight to the interpretations by physicians with superior radiological qualifications. *See McMath v. Director, OWCP*, 12 BLR 1-6 (1988); *Clark v. Karst-Robbins Coal Co.*, 12 BLR 1-149 (1989) (en banc). Interpretations by a physician who is a "B" reader and is certified by the American Board of Radiology may be given greater evidentiary weight than an interpretation by any other reader. *See Woodward v. Director, OWCP*, 991 F.2d 314, 316 n.4 (6th Cir. 1993); *Herald v. Director, OWCP*, BRB No. 94-2354 BLA (Mar. 23, 1995) (unpublished). When evaluating interpretations of miners' chest x-rays, an administrative law judge may assign greater evidentiary weight to readings of physicians with superior qualifications. 20 C.F.R. § 718.202(a)(1); *Roberts v. Bethlehem Mines Corp.*, 8 BLR 1-211, 1-213 (1985). The Benefits Review Board and the United States

Court of Appeals for the Sixth Circuit have approved attributing more weight to interpretations of "B" readers because of their expertise in x-ray classification. *See Warmus v. Pittsburgh & Midway Coal Mining Co.*, 839 F.2d 257, 261 n.4 (6th Cir. 1988); *Meadows v. Westmoreland Coal Co.*, 6 BLR 1-773, 1-776 (1984). The Board has held that it is also proper to credit the interpretation of a dually-qualified physician over the interpretation of a B-reader. *Cranor v. Peabody Coal Co.*, 22 B.L.R. 1-1 (1999) (en banc on recon.); *Sheckler v. Clinchfield Coal Co.*, 7 B.L.R. 1-128 (1984). *See also Roberts v. Bethlehem Mines Corp.*, 8 B.L.R. 1-211 (1985) (weighing evidence under Part 718).

The weight of the x-ray evidence clearly counsels a conclusion that pneumoconiosis is not present, and I so find. Only one x-ray interpretation – Dr. Baker's March 28, 2000 interpretation – concluded that the disease was present. Dr. Baker's interpretation is entitled and I grant it probative weight, as the doctor is dually-qualified. However, two other dually-qualified physicians rendered x-ray interpretations that were negative for pneumoconiosis for the same x-ray film. Dr. Baker's positive interpretation is outweighed even if I were to solely weigh the interpretations of the March 28, 2000 x-ray film, as his interpretations is countered by three negative interpretations. Two dually-qualified physicians and one "B" reader advanced those negative interpretations. The evaluation of the March 28, 2000 x-ray aside, the great weight of the evidence demonstrates that pneumoconiosis is not present in the miner.

Because the negative readings constitute the majority of interpretations and are verified by more, highly-qualified physicians, I find that the x-ray evidence is negative for pneumoconiosis.

Under Section 718.202(a)(2), a claimant may establish pneumoconiosis through biopsy or autopsy evidence. This section is inapplicable herein because the record contains no such evidence.

Under Section 718.202(a)(3), a claimant may prove the existence of pneumoconiosis if one of the presumptions at Sections 718.304 to 718.306 applies. Section 718.304 requires x-ray, biopsy, or equivalent evidence of complicated pneumoconiosis. Because the record contains no such evidence, this presumption is unavailable. The presumptions at Sections 718.305 and 718.306 are inapplicable because they only apply to claims that were filed before January 1, 1982, and June 30, 1982, respectively. Because none of the above presumptions applies to this claim, claimant has not established pneumoconiosis pursuant to Section 718.202(a)(3).

Section 718.202(a)(4) provides the fourth and final way for a claimant to prove that he has pneumoconiosis. Under section 718.202(a)(4), a claimant may establish the existence of the disease if a physician exercising reasoned medical judgment, notwithstanding a negative x-ray, finds that he suffers from pneumoconiosis. Although the x-ray evidence is negative for pneumoconiosis, a physician's reasoned opinion may support the presence of the disease if it is supported

by adequate rationale besides a positive x-ray interpretation. *See Trumbo v. Reading Anthracite Co.*, 17 BLR 1-85, 1-89 (1993); *Taylor v. Director, OWCP*, 1-22, 1-24 (1986). The weight given to each medical opinion will be in proportion to its documented and well-reasoned conclusions. A "documented" opinion is one that sets forth the clinical findings, observations, facts and other data on which the physician based the diagnosis. *Fields v. Island Creek Coal Co.*, 10 BLR 1-19 (1987); *Fuller v. Gibraltar Coal Corp.*, 6 BLR 1-1291 (1984). A report may be adequately documented if it is based on items such as a physical examination, symptoms and patient's history. *See Hoffman v. B & G Construction Co.*, 8 BLR 1-65 (1985); *Hess v. Clinchfield Coal Co.*, 7 BLR 1-295 (1984); *Buffalo v. Director*, OWCP, 6 BLR 1-1164, 1-1166 (1984); *Gomola v. Manor Mining and Contracting Corp*., 2 BLR 1-130 (1979). A "reasoned" opinion is one in which the underlying documentation and data are adequate to support the physician's conclusions. *See Fields, supra*. The determination that a medical opinion is "reasoned" and "documented" is for this Court to determine. *See Clark v. Karst-Robbins Coal Co.*, 12 B.L.R. 1-149 (1989)(en banc).

Two physicians, Drs. Dahhan and Baker, issued reports addressing the presence or absence of pneumoconiosis within the claimant. Each opinion shall be addressed in turn.

The record contains two opinions from Dr. Baker. The first opinion is the physician's March 28, 2000 report. I find that this report does not constitute a "reasoned medical judgment" as the doctor's conclusion of pneumoconiosis is clearly based only upon the doctor's x-ray interpretation and Claimant's history of coal dust exposure. These factors alone cannot and do not constitute a medical opinion of pneumoconiosis. *See Cornett v. Benham Coal, Inc.*, 227 F.3d 569 (6th Cir. 2000)(holding that if a physician bases his or her finding of coal workers' pneumoconiosis only upon the miner's history of coal dust exposure and a positive chest x-ray, then the opinion should not count as a reasoned medical judgment under § 718.202(a)(4)).

Dr. Baker's second opinion is a letter written by him on June 16, 2000. The letter merely reiterates his previous findings, and, more importantly, does not demonstrate a basis for his determination of pneumoconiosis other than those already discussed. Accordingly, I find the June 16, 2000 letter is not a reasoned medical judgment under § 718.202(a)(4)). *Id.*

I find Dr. Dahhan's opinion substantially well reasoned and well documented, and I grant it probative weight, although not full probative weight. The doctor's conclusion regarding the absence of pneumoconiosis was based upon his physical examination, arterial blood gases, pulmonary function tests, chest x-rays, and other doctors' opinions. I grant the doctor's opinion less probative weight, however, due to inconsistencies in his opinion. First, the doctor cites Claimant's pulmonary function test results as a basis of his opinion that pneumoconiosis is absent. Pulmonary function tests, however, are in no form or fashion indicative of the disease. The Board has held that pulmonary function studies are not diagnostic of the presence or absence of pneumoconiosis.

Burke v. Director, OWCP, 3 B.L.R. 1-410 (1981); *see also Cornett v. Benham Coal, Inc*., 227 F.3d 569 (6th Cir. 2000)(holding that a medical opinion attributing the miner's respiratory impairment to his smoking history on grounds that pulmonary function testing produced a purely obstructive defect was not well-reasoned). Second, Dr. Dahhan proceeds to criticize the claimant's performance on the pulmonary function tests later in his opinion, stating that the claimant's "poor performance" made the results unreliable. While reliance upon non-conforming test results is not necessarily grounds for according an opinion less probative weight, the doctor's failure to explain the relevant and probative aspects of the pulmonary function test, which he only sentences earlier had questioned due to poor patient performance, renders his opinion inadequately explained and poorly reasoned. *See Brazzale v. Director, OWCP*, 803 F.2d 934 (8th Cir. 1986)(a physician's opinion may be found unreasoned, given inconsistencies in the physician's testimony and other conflicting opinions of record). For these reasons, I accord less weight to Dr. Dahhan's opinion, although I do find it retains a substantial level of probativeness due to its thoroughness, documentation, and, aside from the noted improper use of the pulmonary function tests results, reasonableness. As Dr. Dahhan opined that pneumoconiosis was absent, however, the probative weight of the doctor's opinion does not aid the claimant in his burden of proof.

The claimant has failed to demonstrate, by a preponderance of the evidence, the existence of pneumoconiosis under any of the methods contained in section 718.202(a). Concomitantly, Claimant has failed to demonstrate a material change in conditions as regards this element of benefits entitlement.

Once it is determined that the miner suffers (or suffered) from pneumoconiosis, it must be determined whether the miner's pneumoconiosis arose, at least in part, out of coal mine employment. 20 C.F.R. § 718.203(a). As the claimant has failed to demonstrate pneumoconiosis, this analysis is unnecessary.

Total Disability Due to Pneumoconiosis

A miner is considered totally disabled when his pulmonary or respiratory condition prevents him from performing his usual coal mine work or comparable work. 20 C.F.R. § 718.204 (b)(1). Non-respiratory and non-pulmonary impairments have no bearing on a finding of total disability. *See Beatty v. Danri Corp.*, 16 BLR 1-11, 1-15 (1991). Section 718.204(b)(2) provides several criteria for establishing total disability. Under this section, I must first evaluate the evidence under each subsection and then weigh all of the probative evidence together, both like and unlike evidence, to determine whether claimant has established total respiratory disability by a preponderance of the evidence. *Shedlock v. Bethlehem Mines Corp.*, 9 BLR 1-195, 1-198 (1987).

Under Sections 718.204(b)(2)(i) and (b)(2)(ii), total disability may be established with qualifying pulmonary function studies or arterial blood gas studies.[4]

In the pulmonary function studies of record, there is a discrepancy in the height attributed to the claimant. The fact-finder must resolve conflicting heights of the miner recorded on the ventilatory study reports in the claim. *Protopappas v. Director, OWCP*, 6 B.L.R. 1- 221 (1983). *See also Toler v. Eastern Assoc. Coal Co.*, 43 F.3d 109 (4th Cir. 1995). The mean height attributed to the miner is 70.125 inches. The median height attributed to the miner is 69.875 inches. I find the miner's height to be 70 inches, as that represents the mean of the median and mean heights reported for the miner in the record.

All ventilatory studies of record, both pre-bronchodilator and post- bronchodilator, must be weighed. *Strako v. Ziegler Coal Co.*, 3 B.L.R. 1-136 (1981). To be qualifying, the FEV_1 as well as the MVV or FVC values must equal or fall below the applicable table values. *Tischler v. Director, OWCP*, 6 B.L.R. 1-1086 (1984). I must determine the reliability of a study based upon its conformity to the applicable quality standards, *Robinette v. Director, OWCP*, 9 B.L.R. 1- 154 (1986), and must consider medical opinions of record regarding reliability of a particular study. *Casella v. Kaiser Steel Corp.*, 9 B.L.R. 1-131 (1986). In assessing the reliability of a study, I may accord greater weight to the opinion of a physician who reviewed the tracings. *Street v. Consolidation Coal Co.*, 7 B.L.R. 1-65 (1984). Because tracings are used to determine the reliability of a ventilatory study, a study which is not accompanied by three tracings may be discredited. *Estes v. Director, OWCP*, 7 B.L.R. 1-414 (1984). If a study is accompanied by three tracings, then I may presume that the study conforms unless the party challenging conformance submits a medical opinion in support thereof. *Inman v. Peabody Coal Co.*, 6 B.L.R. 1-1249 (1984). Also, little or no weight may be accorded to a ventilatory study where the miner exhibited "poor" cooperation or comprehension. *Houchin v. Old Ben Coal Co.*, 6 B.L.R. 1-1141 (1984); *Runco v. Director, OWCP*, 6 B.L.R. 1-945 (1984); *Justice v. Jewell Ridge Coal Co.*, 3 B.L.R. 1-547 (1981).

Four pulmonary function studies exist in the record. Three of the four studies produced qualifying values. The March 28, 2000 study did not produce qualifying values, and, although irrelevant, Dr. Burki invalidated the study due to poor effort on the part of the claimant. In his written opinion, Dr. Baker recorded, "PFTS, ? effort." The April 28, 2000 study produced qualifying FEV1 and FEV1/FVC values. The December 21, 2000 study produced qualifying

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[4]A "qualifying" pulmonary function study or arterial blood gas study yields values that are equal to or less than the applicable table values found in Appendices B and C of Part 718. *See* 20 C.F.R. § 718.204(b)(2)(i) and (ii). A "non-qualifying" test produces results that exceed the table values.

pre-bronchodilator FEV1 and MVV values, but the same study did not produce qualifying post-bronchodilator values. The February 1, 2001 study produced qualifying FEV1, MVV, and FEV1/FVC values.

On the December 21, 2000 study, performed during Dr. Dahhan's examination, the doctor stated that the clamant displayed "fair" cooperation and "fair" comprehension. However, in his narrative opinion, Dr. Dahhan ranked the claimant's performance as "less than optimum effort" and a "poor performance." These seemingly inconsistent opinions muddle whether the test was valid. "Poor" cooperation or comprehension invalidates a pulmonary function test. *Houchin, supra*. If "fair" effort is noted on the study, however, the study *may* be conforming. *Laird v. Freeman United Coal Co.*, 6 B.L.R. 1-883 (1984); *Verdi v. Price River Coal Co.*, 6 B.L.R. 1-1067 (1984); *Whitaker v. Director, OWCP*, 6 B.L.R. 1-983 (1984).

In the instant case, however, I find that the December 21, 2000, study was non-conforming. The Benefits Review Board has previously determined that other circumstances can result in a non-conforming test with "fair" cooperation. *See Clay v. Director, OWCP*, 7 B.L.R. 1-82 (1984). The December pulmonary function test, in this case, has mitigating circumstances that lead me to conclude that the test is invalid. Dr. Dahhan includes two comments in his report that question the effort of the claimant. The doctor's conclusion of effort was obtained by review of the study tracings, and he explicitly states the basis for his conclusion of poor effort. *Chester v. Hi-Top Coal Co.*, 22 B.L.R. 1-___ (2001). I must consider Dr. Dahhan's opinion of reliability. *Casella v. Kaiser Steel Corp.*, 9 B.L.R. 1-131 (1986). Based upon the doctor's personal conclusions as to the claimant's effort and the objective data which he cites for support, I find the December 21, 2000 pulmonary function study to be non-conforming.

I fund that the remaining two studies producing qualifying results – April 28, 2000, and February 1, 2001 – are conforming to the quality standards. 20 C.F.R. §718.103.

All blood gas study evidence of record must be weighed. *Sturnick v. Consolidation Coal Co.*, 2 B.L.R. 1-972 (1980). This includes testing conducted before and after exercise. *Coen v. Director, OWCP*, 7 B.L.R. 1-30 (1984); *Lesser v. C.F. & I. Steel Corp.*, 3 B.L.R. 1-63 (1981). In order to render a blood gas study unreliable, the party must submit a medical opinion that a condition suffered by the miner, or circumstances surrounding the testing, affected the results of the study and, therefore, rendered it unreliable. *Vivian v. Director, OWCP*, 7 B.L.R. 1-360 (1984) (miner suffered from several blood diseases); *Cardwell v. Circle B Coal Co.*, 6 B.L.R. 1-788 (1984) (miner was intoxicated). Similarly, in *Big Horn Coal Co. v. Director, OWCP [Alley]*, 897 F.2d 1045 (10th Cir. 1990) and *Twin Pines Coal Co. v. U.S. DOL*, 854 F.2d 1212 (10th Cir. 1988), the court held that the administrative law judge must consider a physician's report which addresses the reliability and probative value of testing wherein he or she attributes qualifying results to non- respiratory factors such as age, altitude, or obesity.

Both arterial blood gas studies of record produced non-qualifying values.

Section 718.204(b)(2)(iii) provides that a claimant may prove total disability through evidence establishing cor pulmonale with right-sided congestive heart failure. This section is inapplicable to this claim because the record contains no such evidence.

Where a claimant cannot establish total disability under subparagraphs (b)(2)(i), (ii), or (iii), Section 718.204(b)(2)(iv) provides another means to prove total disability. Under this section, total disability may be established if a physician exercising reasoned medical judgment, based on medically acceptable clinical and laboratory diagnostic techniques, concludes that a respiratory or pulmonary impairment prevents the miner from engaging in his usual coal mine work or comparable and gainful work.

The weight given to each medical opinion will be in proportion to its documented and well-reasoned conclusions. A "documented" opinion is one that sets forth the clinical findings, observations, facts and other data on which the physician based the diagnosis. *Fields v. Island Creek Coal Co.*, 10 BLR 1-19 (1987); *Fuller v. Gibraltar Coal Corp.*, 6 BLR 1-1291 (1984). A report may be adequately documented if it is based on items such as a physical examination, symptoms and patient's history. *See Hoffman v. B & G Construction Co.*, 8 BLR 1-65 (1985); *Hess v. Clinchfield Coal Co.*, 7 BLR 1-295 (1984); *Buffalo v. Director*, OWCP, 6 BLR 1-1164, 1-1166 (1984); *Gomola v. Manor Mining and Contracting Corp*., 2 BLR 1-130 (1979). A "reasoned" opinion is one in which the underlying documentation and data are adequate to support the physician's conclusions. *See Fields, supra*. The determination that a medical opinion is "reasoned" and "documented" is for this Court to determine. *See Clark v. Karst-Robbins Coal Co.*, 12 B.L.R. 1-149 (1989)(en banc).

In assessing total disability under § 718.204(c)(4), the administrative law judge, as the fact-finder, is required to compare the exertional requirements of the claimant's usual coal mine employment with a physician's assessment of the claimant's respiratory impairment. *Cornett v. Benham Coal, Inc.*, 227 F.3d 569, Case No. 99-3469 (6th Cir. 2000) (a finding of total disability may be made by a physician who compares the exertional requirements of the miner's usual coal mine employment against his physical limitations); *Schetroma v. Director, OWCP*, 18 B.L.R. 1-19 (1993) (a qualified opinion regarding the miner's disability may be given less weight). *See also Scott v. Mason Coal Co.*, 14 B.L.R. 1-37 (1990)(en banc on recon.). Once it is demonstrated that the miner is unable to perform his or her usual coal mine work, a prima facie finding of total disability is made and the party opposing entitlement bears the burden of going forth with evidence to demonstrate that the miner is able to perform "comparable and gainful work" pursuant to § 718.204(c)(2). *Taylor v. Evans & Gambrel Co.*, 12 B.L.R. 1-83 (1988).

The record contains two physician opinions addressing the existence and severity of Claimant's impairment. For the following reasons, I find that the narrative medical opinion evidence weighs heavily against a finding of total disability.

Dr. Dahhan opined that the claimant was not totally disabled, and I find his opinion entitled to probative weight. The doctor's opinion is well reasoned and well documented. I find that the doctor's opinion is well reasoned despite a seemingly illogical statement in his report. Dr. Dahhan states:

> Due to poor performance on spirometry testing, direct measurement of Mr. Barrett's ventilatory capacity is not possible. However, all other parameters of his respiratory system indicate no evidence of total or permanent pulmonary disability including the clinical examination of the chest, lung volume measurements and diffusion capacity with both being normal, arterial blood gas measurements and chest x-ray.

The doctor's comment concerning the claimant's poor effort on the spirometry would appear to invalidate his reliance on other readings obtained by the pulmonary function test besides ventilatory capacity; however, the Board has held that such use is permissible. In *Crapp v. U.S. Steel Corp.*, 6 B.L.R. 1-476 (1983), the Board held that a non-conforming pulmonary function study may be entitled to probative value where the results exceed the table values, i.e., the test is non-qualifying. In particular, the Board noted that the non-qualifying study was not accompanied by statements of the miner's cooperation and comprehension, thus rendering it non-conforming. However, it stated the following:

> [T]he lack of these statements does not lessen the reliability of the study. Despite any deficiency in cooperation and comprehension, the demonstrated ventilatory capacity was still above the table values. Had the claimant understood or cooperated more fully, the test results could only have been higher.
> . . .
> It should be noted, however, that the only non- conforming pulmonary function tests that may be considered on invocation are those with non-qualifying results and that are non-conforming only due to a lack of statements of cooperation and/or comprehension.

Id. at 1-479. Accordingly, the doctor's invocation of the results of the non-conforming pulmonary function tests does not render his opinion unreasoned. As the doctor reaches clear, well-explained

medical conclusions supported by objective documentation, I accord his opinion of no total disability probative weight.

Dr. Baker's June 16, 2000 letter does not address the level of impairment, and I accord it no probative weight regarding the impairment level of the claimant.

Dr. Baker's March 28, 2000 opinion, however, opines that the claimant suffers from a "moderate impairment" and lacks the respiratory capacity to perform the work of a coal miner or comparable work in a dust-free environment. The lone basis the doctor cites for his determination of total disability is the claimant's March 28, 2000 pulmonary function test. I accord less weight to Dr. Baker's opinion for three reasons.

First, the opinion is not well reasoned. Dr. Baker asserts that the March FEV1 rating achieved by the claimant is evidence of moderate impairment; however, Dr. Baker fails to address the entirety of the March pulmonary function test. The test itself did not produce qualifying values, as only the FEV1 measurement fell below regulation standards. The doctor's failure to address this result compromises the reasoning of his opinion, and I grant it less probative weight accordingly.

Second, Dr. Baker fails to compare the exertional requirements of the claimant's previous coal mining employment with the level of impairment he identified. Such a failure undermines the doctor's conclusion that the claimant is incapable of returning to his previous coal mining or comparable work. *Cornett v. Benham Coal, Inc*., 227 F.3d 569 (6th Cir. 2000)(a finding of total disability may be made by a physician who compares the exertional requirements of the miner's usual coal mine employment against his physical limitations). For this, I also accord less probative weight to the doctor's opinion.

Third, Dr. Baker's opinion regarding total disability is not well reasoned as he relies solely on a questionable medical exam to support his conclusion that the claimant is moderately impaired. Dr. Burki opined that the pulmonary function test results were invalid because of the comments of the test observer and the test tracings. His review is clear, based on objective evidence, and thorough.. *Brinkley v. Peabody Coal Co.*, 14 B.L.R. 1-147 (1990)(holding that if the administrative law judge credits an consultant's opinion over one who actually observed the test, a rationale must be provided). Furthermore, Dr. Baker himself recorded doubts concerning the claimant's effort on the March 28, 2000 pulmonary function test, writing in his report, "PFTS, ? effort." The classification of Claimant's cooperation as "fair," the questioning of Claimant's effort on the test, and Dr. Burki's invalidation of the study lead me to accord less weight to Dr. Baker's opinion of moderate impairment as it is based upon questionable objective findings. *See Arnoni v. Director, OWCP*, 6 B.L.R. 1-423 (1983)(holding that an administrative law judge properly discredited a physician's opinion which was based upon a ventilatory study which was later found nonconforming); *Mahan v. Kerr-McGee*, 7 B.L.R. 1-159 (1984).

A review of the evidence addressing total disability demonstrates that the claimant has not carried his burden of demonstrating a material change in conditions. While the weight of the valid and conforming pulmonary function tests alone may suggest total disability, when combined with the arterial blood gases, which provide no evidence of total disability, and the medical opinions, which weigh heavily against a finding of total disability, the weight of the evidence directs a finding of no total disability, and I so find. Assuming, arguendo, that I granted full probative weight to Dr. Baker's opinion of total disability, the evidence of total disability would sit in equipoise, and Claimant would again fail to carry his burden of demonstrating entitlement elements by a preponderance of the evidence.

The evidence submitted subsequent to the previous denial does not demonstrate, by a preponderance of the evidence, that the claimant is totally disabled. Accordingly, the claimant cannot demonstrate a material change in conditions, and his refiled claim must be denied. *Sharondale Corp. v. Ross*, 42 F.3d 993, 997-98 (6th Cir. 1994).

Conclusion

In sum, the evidence does not establish the existence of pneumoconiosis or a totally disabling respiratory impairment. The record does not evince a material change in conditions, and, accordingly, the claim of James Blevins Barrett must be denied.

Attorney's Fee

The award of an attorney's fee is permitted only in cases in which the claimant is found to be entitled to benefits. Because benefits are not awarded in this case, the Act prohibits the charging of any fee to claimant for legal services rendered in pursuit of the claim.

ORDER

The claim of James Blevins Barrett for benefits under the Act is denied.

A
JOSEPH E. KANE
Administrative Law Judge

NOTICE OF APPEAL RIGHTS: Pursuant to 20 C.F.R. § 725.481, any party dissatisfied with this Decision and Order may appeal it to the Benefits Review Board within thirty days from the date of this decision by filing a Notice of Appeal with the Benefits Review Board at P.O. Box 37601, Washington D.C. 20013-7601. This decision shall be final thirty days after the filing of this decision with the district director unless appeal proceedings are instituted. 20 C.F.R. §725.479. A copy of this Notice of Appeal must also be served on Donald S. Shire, Associate Solicitor for Black Lung Benefits, 200 Constitution Avenue, N.W., Room N-2605, Washington, D.C. 20210.